# Central Law Journal

St. Louis, November 20, 1925


## THE EVOLUTION QUESTION AGAIN

We have received some correspondence relative to the editorial appearing in the Journal of September 5th, as evidenced by two letters herewith published. We still believe our statements were justified, but an explanation may be due the writer of the letter last herein set out. The first letter follows:

"I have just read with interest the article on the Tennessee Anti-evolution Statute in your issue of the 5th instant and am glad to note that you do not regard the statute as an effort to control conscience or as affecting the right to free speech or as adding a new test to the qualifications of teachers in the state schools.

"In the course of the article there was a statement that 'so far as our country is concerned with government, it is not a Christian, a Jewish, nor any other sort of a religious or sectarian country.' Has your attention ever been called to the opinion of the Federal Supreme Court in Church of the Holy Trinity vs. United States, 143 U. S. 457, wherein Judge Brewer, speaking for a unanimous court, points out that 'this is a religious people' and that the Christian religion is a part of the common law of the country?"

We have read the case referred to since receiving the letter, and thank the writer for directing attention to it. Essentially a great deal of religion has got into the law, and properly so. The Ten Commandments, in existence before the coming of the Christ, are in our law. They were a part of the religion of a very intelligent race of people—the Jews. There can be no objection to this. Still, in so far as our country is concerned with government, it is not a Jewish country, although a government and a country for the Jews. And have we not taken some of our law from the Pagans?

We are a little more proud of the other letter, because it contains a good, strong call-down. It has pep and vigor. Aside from its last paragraph, it is the kind we like to get. The writer of it has this to say:

"I have received Central Law Journal, No. 17 of Vol. 98, and I have read with much interest the leading article therein on 'The Tennessee Anti-Evolution Law.'

"You do not appear to realize that your caustic editorial is an unjustifiable indictment of the people of a great State, who are neither narrow, bigoted and intolerant, nor do they lack respect for American principles—a State that won an empire for the struggling Union, and gave to that Union three of its greatest Presidents.

"The Statute expresses the deliberate and informed judgment of a great majority of the people of Tennessee. There is no littleness behind that important bit of legislation: it does not forbid any one, either inside or outside of the State, to have any opinion he wishes, or to propagate his opinions by writing, speaking or teaching. He may endow schools, if he wishes, where his views on any question may be freely taught. By the Act the people of Tennessee mean simply, that the hand that writes the pay check has a right to forbid the teaching of an hypothesis which it is forbidden by law to combat in the same school-room. It insures equal treatment of Christian, infidel, agnostic, and evolutionist in the tax-supported schools of the State.

"With the current volume of the Central Law Journal, you will be kind enough to drop my name from your mailing list. We do not pretend to be very sophisticated, but we certainly do know enough to quit feeding a hand that smites us."

The writer of the letter agrees with us in our conclusion as to the validity of the

Act, but takes offense at our statement concerning "the narrowness, bigotry and intolerance, and lack of respect for American principles evidenced by the statute." Possibly, the offense is due to the thought that it was intended to single out the people of the State of Tennessee as objects of our "caustic" remarks. We criticised them without regard to the imaginary line surrounding them, as a part of all of us. We call the writer's attention to the statement in the same editorial about mankind generally. That illustrates the spirit in which the article was written. He took no offense at that.

However, we were glad to get the letter, although sorry to lose one of our best subscribers. Constructive criticism is beneficial. We are glad to read it from one whom we believe to be a real fighter.

As to the accomplishments of Tennessee for herself and all the rest of us, we agree with the writer of the letter, and call attention to a reprint in the Journal for October 5th, from an English law periodical, which also criticised the spirit behind the Tennessee Evolution Statute in the same issue.

## NOTES OF IMPORTANT DECISIONS

MEANING OF "MERCHANDISE" WITHIN BULK SALES LAW.—Electric fixtures and materials used in wiring, carried in stock by one engaged in wiring buildings, and sold in regular and usual conduct of seller's business to any one who would hire seller to install them, are held in Mott v. Reeves, 211 N. Y. Supp. 375, to constitute "merchandise" within Bulk Sales Law (Personal Property Law, § 44); "merchandise" meaning objects of commerce, whatever is usually bought and sold in trade, or commerce, or by merchants, etc.

Defendant insists that, inasmuch as the articles purchased by him were not such as were ordinarily sold over the counter to one who came into the store, but rather were used in the contracting part of the seller's business, and went into and formed a part of a completed structure without the patron's seeing or handling them, they do not constitute merchandise within the strict construction which must be given to this statute.

"The act itself does not define what is meant by the expression 'stock of merchandise,' neither does it place any limit on its meaning. There is no decision in this or any other state having a similar statute, so far as I have been able to find, which defines with any degree of accuracy the term as used in connection with the Bulk Sales Law. Therefore it would appear proper to accept the ordinary and usual definition of the word, having in mind the connection in which it is used, and the purpose of the statute. 'Merchandise' is a broad and general term. It is defined in Webster's International Dictionary as follows:

" 'The objects of commerce; whatever is usually bought and sold in trade, or commerce, or by merchants; wares; goods; commodities.'

"Bouvier's description of the expression as including all those things which merchants sell, either at wholesale or retail, such as dry goods, hardware, groceries, drugs, etc., is adopted with approval in Pearce, Wheless & Co. v. City Council of Augusta, 37 Ga. 597, and In re San Gabriel Sanatorium Co. (D. C.) 95 Fed. 271.

"In Groves v. Slaughter, 15 Pet. 506, 10 L. Ed. 800, the court said:

" 'Merchandise is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation.'

"In Kent v. Liverpool, etc., Ins. Co., 26 Ind. 294, 89 Am. Dec. 463, it was said:

" 'We are not aware that the term "merchandise" has any fixed and technical legal signification.'

"In the above cases the Bulk Sales Law was not under discussion, but in the following cases, where the courts have discussed in general terms what was meant by the word 'merchandise,' a statute similar to the one which forms the basis of this action was under consideration.

"In Gallus v. Elmer, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067, in attempting to define the phrase 'stock of merchandise' as used in the Massachusetts Bulk Sales Law, the court says that it consists of 'articles which the seller keeps for sale in the usual course of his business.'

"In People's Savings Bank v. Van Allsburg, 165 Mich. 524, 131 N. W. 101, the court, in discussing the question of whether the articles sold constituted 'merchandise' within the meaning of that term as used in the Michigan statute, said:

" 'We think that "merchandise," as used in this act, must be construed to mean such things

as are usually bought and sold in trade by merchants.'

"In the light of the above definitions, and giving to the word its natural and usual meaning, nothing can be more plain to me than that the articles which composed the sale complained of were merchandise, and are covered by the statute in question. They were not bought by McLaughlin & Savage, Inc., to keep or to use for its own individual purpose. They were bought and kept for sale to persons who wanted their buildings wired, and they were, before the sale to defendant, sold in the regular and usual conduct of the seller's business to any one who would buy them and hire the seller to do the work of installing them in the building. The mere fact that they were sold only in connection with work to be done, and to the same person for whom it was to be done, does not take away from the transaction the character of a sale or from the articles themselves the marks of merchandise.

"The material in question is such as is usually sold and used in wiring buildings. It is not like horses, wagons, harnesses, shovels, baskets, etc., used by a coal dealer in his business, which were held not to be merchandise within the meaning of that term as used in the Michigan statute in Bowen v. Quigley, 165 Mich. 337, 130 N. W. 690, 34 L. R. A (N. S.) 218; nor is it similar to horses, wagons, and harnesses used by a livery stable keeper, which were held not to be merchandise under the Washington act in Everett Produce Co. v. Smith Bros., 40 Wash. 566, 82 P. 905, 2 L. R. A. (N. S.) 331, 111 Am. St. Rep. 979, 5 Ann. Cas. 798; nor does it resemble tools, etc., used in connection with a retail meat grocery business, which were likewise construed as not within the meaning of the Massachusetts statute in Gallus v. Elmer, 193 Mass. 106, 78 N. E. 772, 8 Ann. Cas. 1067."

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It seems there is a bank that prints the following on its salary receipts:

"Your salary is your personal business—a confidential matter—and should not be disclosed to anyone else."

One of the men in signing the receipt added below:

"I won't mention it to anybody. I'm just as much ashamed of it as you are."

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Cop: "Hey, where are you going? Don't you know this is a one-way street?"

Abe (in a new car): "Vell, I'm only going von way, ain't I?"

## SOVEREIGNTY*

We are confronted continually with so many political and governmental problems in America. We hear so many divergent opinions on each and all of them. Hobbes said the axioms of geometry would be disputed were the interests of men concerned in them and it is, therefore, not surprising that men differ in the field of political speculation.

A Vice-President goes to the country for a change in the rules of procedure in the Senate. The Congress submits to the legislatures of the States a proposed amendment of the Constitution of the United States respecting the labor of children. The Senate is considering a treaty which contemplates our participation in a world court. We were recently considering a proposed alliance in the League of Nations. These are some of the questions we are discussing and determining.

It may well be we can answer some of these and other similar questions by thoughtful recurrence to a few fundamental concepts reflected in the Constitution of the United States.

It would seem highly desirable, if not necessary, to proceed to the unknown from the known and to learn whether any American political principle is involved in any great question under discussion, so that we may apply that principle.

We cannot discuss the known unless it *is* known. We must have some familiarity with the history and nature of our political institutions before we can engage in discussions which may be intelligible and helpful. The torch of knowledge will dispel many of the question marks that beset and darken our pathway. In determining our action on any question we should apply the principle which appeals to us as being true and correct. Should there be those who disagree in principle, the field may be quit, after the battle is lost or

*Address by Senator George H. Williams at Annual Meeting of the Missouri Bar Association, St. Louis, October 3, 1925.

won, with dignity, respect and good will, because the contest was impersonal.

There is great necessity to find and keep a firm footing from which to judge the modern tendencies in political thought.

The essential thing to get in a discussion of this nature is a principle that can be used and applied to concrete cases as they arise. The thing that changes in political thought is the circumstance, the occasion. The principle that can be used in settling these remains permanent.

The great need of the present age is to get back to the spirit, the principles and the methods of the age in which the Constitution was adopted. What we need today in the United States is to become more familiar with the Constitution of the United States and the fundamental principles it contains. An application of the principles contained there will solve most, if not all, of the diverse and complex problems presented to us today.

It is said that the Constitution of the United States is out of date; that it is an eighteenth century document; that it was written to solve the problems of that narrow and limited world; that we live in a new world today and that the Constitution does not contain the principles we can apply to present day political needs. This is an erroneous impression. The Constitution of the United States is the greatest document ever struck from the hand of man, according to Gladstone. It was the product of perhaps the greatest thinkers in political thought that any age has ever produced. It represents a thousand years of accumulated experience in government.

As an illustration of some of the principles and of the methods used by the framers of the Constitution, let us take the treatment of commerce. The Constitution states very briefly that Congress shall have power to regulate commerce among the several states, with foreign nations and with the Indian tribes. That is the whole of the power granted. There is no attempt to go into detail to explain what commerce is or what it may be or to limit this power. What commerce was in 1787 was entirely different from what it was in 1825, 1860, 1900 or is at the present time or may be a century from now. Yet, whatever content may be given to the term "commerce," Congress will still have the right to control it among the states or with foreign nations or with the Indian tribes. Commerce, at the time the Constitution was adopted, was limited very largely to ocean traffic and to traffic on the rivers. Today commerce includes practically all sorts of relationships, including invisible radio messages, protection of birds and mapping the ways for the passage of airships. The purpose of this illustration is simply to indicate the wisdom of the framers of the Constitution of the United States in producing a document that can be applied to all succeeding contingencies of government, and the thing that is needed today is to get back to the spirit that gave us the Constitution and to lay hold upon certain fundamental principles that can be applied to the rather complex and perplexed conditions of national and international thought.

My subject tonight is Sovereignty. My purpose is to consider its nature and its residence.

A rather clear definition of certain fundamental concepts is essential to clear thinking. A misunderstanding of certain terms that are commonly used leads to a chaotic and confused situation. For instance, the terms "people," "sovereignty," "state," "nation," "government," are continually confused and used interchangeably. Let us define these terms. The most fundamental of these terms, the one that we must start from as a basis, is the term State. What is a State? A State consists in a group of people occupying a definite territory, possessing a political organization called a government, having permanence and possessing sovereignty. Sovereignty is the chief ear-mark of a State.

Sovereignty is to be found in all States and among all peoples who have a society organized as a political body. No State can exist without sovereignty.

The term itself implies ultimate, unlimited power. It does not admit of divisibility—its unity and integrity are ever present.

Sovereignty is not a characteristic of the government. No government is sovereign.

The fallacy of the political thought in the United States previous to the Civil War was largely due to the confusion on that point in that the leading political thinkers were quarreling as to which government was sovereign. Government is the political organization of the State. A State has a government just as we have hands. The government is the machinery of the State. The government is the State organized for work. The government is the State in action. A government derives its power from the State or from the people. It has no power in itself. All just governments derive their power from the consent of those governed. This does not mean that governments have always done this. In ancient times governments derived their power from other sources.

The great contributions we have made to political experience and thought have been largely in two things, if we view the subject broadly. We have demonstrated in practice that a government deriving its power from the State or the people is the only free government that can be established. Until the Eighteenth Century governments always justified their existence and were always organized on the theory that they derived their power from some other source. Our great experiment in government has revolutionized that thought. Walter Hines Page, after serving eight years as our Ambassador at the Court of St. James, having been frequently accused of being pro-English and un-American, and after spending many years in other countries of Europe made the significant statement at the close of his career that real democracy is enjoyed in just a few places in the world, namely, in the United States and a few of the self-governing colonies of Great Britain, such as Australia, New Zealand and Canada; that in this country we have the spirit of democracy.

In England they have a theoretical democracy and their system is honeycombed and shot through and through with survivals of aristocracy and of monarchy. If you go into a railroad office in America to buy a ticket you line up according to time, every man taking his place. That is the spirit in America. In England you line up according to class at a railroad ticket office or in a barber shop or at a theater and Lords and Dukes and Earls of certain classes rank you—they step ahead of you in line and people tolerate and accept it. In other words, the spirit of democracy has not become a practical thing in England or in France or in Germany. It is still an ideal that has not been worked out in practical institutions. In the spirit of democracy there is the feeling of equality which in turn but reflects the consciousness of Sovereignty. That is the first great contribution—we have worked out in America a practical democracy.

The second great contribution we have made to political thought consists in our solution of the conflict that has always existed between the individual and his inalienable or natural rights on the one hand, and the powers of government on the other. Ancient society is replete with examples of powerful national governments such as the great empires of the Tigris and the Euphrates and of the Nile valley and in modern times the Roman Empire. These great governments were established at the expense of individual liberty in the local community. The Roman citizen in order to exercise his right as a Roman citizen had to travel to Rome to exercise that right. The empire was so centralized in its power, whether

that citizen lived on the Thames in England or on the Tigris or the Euphrates or at Jerusalem, he must appeal to Caesar at Rome. On the other hand, we find examples in ancient and in medieval times of local governments in which the rights of individuals were secured locally, but always at the expense of the national government or with no national government at all, as was the case with the Greeks. The Greeks worked out an excellent system of local government, but they never had at the same time a national government. When the Greek cities finally got together under Alexander and established a strong powerful union their local liberty disappeared. Briefly that is the history of civilization. In the United States we have established a national government that is internationally just as powerful as the Roman government, just as much respected abroad as the Roman government was. At the same time the commonwealths solve local problems in our State governments without any or but little consciousness of the existence of a government at Washington, or the municipal or city government solves its local problems scarcely conscious of the existence of the national government. The individual citizen has reserved to him in our scheme of government a sphere of activity that neither city, commonwealth or national government can intrude upon or interfere with. That is America's second great contribution to political thought.

A State has certain characteristics. A State consists in a people occupying a definite territory. Second, it consists in a political organization that we call the government and in the third place it consists in permanence—relative permanence—that is, the State is more permanent than the government. The government changes—the State continues. The only excuse for a government is that it may protect the individual, that it may safeguard individual rights, that it may promote the general welfare. A government is a means to an end always—that is the modern conception. The ancient conception was that the government was the end and the individual was the means to serve the government. The ancient conception and even the early modern conception was that an individual exists for the government. Our conception is the government exists for the individual. Let us now discuss this idea of "people."

The most fundamental thing, the basic thing, is a "State." A State must consist in people who have a political organization we call a government. The people must occupy a definite territory and must possess sovereignty. In a rather broad, loose way we refer to the people as including all the inhabitants of the territory that belongs to the State. In that sense the people represent the location of sovereignty. Sovereignty is located in the people—that is, "the people" used in that broad sense is the source of sovereignty. That is our theory of government. Sovereignty is not to be found in a King, it is not to be found in a government, but in the people. Sovereignty springs from the people. The government is the organization these people have. People, wherever we find them, however primitive they may be, have an organization. They may have numerous organizations, but they always have an organization that we call a government which is political in its nature.

Sovereignty is unlimited, indivisible power. There is no danger in power. The danger is in the *control* of power. Liberty cannot exist without power. There are two conceptions of liberty—one negative, the other positive. The negative conception of liberty, the one first appreciated and first achieved, consisted in getting away from restraints. Men were not free in the Eighteenth Century. They desired liberty—that is, they desired to get away from certain restraints, certain inhibitions, that they might do the things they desired to do. That is a negative conception of liberty. Liberty is also constructive—it is positive—and the essence of constructive liberty is control of power. John

Dewey says an engineer is free to the extent that he can control his engine. A surgeon is free to the extent that he understands human anatomy and the technique of operations and the effects of operations. Therefore, liberty and power are not inconsistent at all. In the Eighteenth Century, because a man had always been a slave or a serf or hemmed in and hedged in on every turn, he commenced to break these bonds and to achieve negative liberty. He rather unconsciously and ignorantly attributed his past condition to power. Therefore, prejudice developed among some political thinkers of the Eighteenth Century against a powerful government. It was said that government is best that governs least. The Articles of Confederation reflected that conception of liberty—a weak national government. A government that could do nothing was essential to liberty, according to that philosophy. The German confederation which required a unanimous vote of all the states in order to check power was in harmony with that negative conception of liberty. Fear of power dominated the political thought at the close of the Eighteenth Century because of the misuse of power by arbitrary and tyrannical governments of Europe.

There is no inconsistency between power and liberty. A man has his individual rights because of sovereignty. He can have no individual rights without sovereignty. Sovereignty, this thing that we call underived, unlimited, indivisible power, therefore, is not to be feared by the citizen—it is to be welcomed, because in it he finds his liberty, he finds his individual rights provided sovereignty is properly located. Therefore, the location of sovereignty forms the very basis of a free government and the liberty of the world politically is due to the fact at the present time that in this country we have properly located sovereignty.

What is the location of sovereignty according to our scheme of government? Sovereignty resides in the people. There is no danger of power so long as it resides there. Individual rights find their basis in sovereignty, cannot exist without it, and an individual had no rights until sovereignty was properly located. The people do not delegate this sovereignty at all—they always keep it—they only delegate power to the government.

We say that the source of sovereignty is in the people. Perhaps we will avoid considerable confusion if we simply say that what is spoken of as legal sovereignty is exercised in our government by the electorate, that is, by that part of the people who vote. Technically speaking, the term "people" in the United States is limited to the electorate and this electorate exercises sovereignty. The source of sovereignty, however, is in the people as a whole. Legal sovereignty is exercised, is made manifest, by the electorate. This electorate is continually changing. Men die. Men move away. But it is continually restored from this storehouse—that is, a boy at five will ultimately vote, a girl at five will ultimately vote. The electorate derive their power to exercise sovereignty from the whole mass of inhabitants that we call the people. The electorate is representative of the whole group of citizens that occupy the given territory that we call a state. A voter, therefore, votes not only for himself, but for all others whom he represents in the state. How necessary then that the great privilege of everyone to vote shall be maintained and safeguarded!

In the early days of the country the writers and statesmen, even practical statesmen, were greatly confused as to where sovereignty was located in a government such as ours, because the government was new and different from any that had ever existed before. The old conception was that sovereignty was located in a king, or in an oligarchy or an aristocracy. We could not accept such a theory. That was about the only thing that we were certain about at the time the Constitution was adopted. But just where under our

scheme of government sovereignty was to be located was not clear, nor made clear. The result was great confusion and many views expressed in regard to that question. The Supreme Court seemed to accept the view, because the Court had to face the problem in a practical way, and the easiest way out seemed to be a conception of division of sovereignty between the state and the commonwealths, and that theory was accepted by many political thinkers. John C. Calhoun, who was perhaps the most profound and logical thinker of his time, advocated correctly the theory that sovereignty in its very nature is indivisible, therefore, the Supreme Court was in error in its interpretation of the nature of sovereignty, but Calhoun was mistaken not in the nature of sovereignty, but in the location of sovereignty, in that he insisted that sovereignty resided in the state government or in the people of the commonwealth.

After the Civil War things commenced to clarify somewhat, and gradually we have had developed a conception of sovereignty, and that conception is that sovereignty is located or has its source and resides in the people of the United States without any reference to state boundaries whatsoever. The thing that caused the difficulty in the early days of the country was the confusion between a state and a government. Government has derived powers, government has enumerated powers, government has limited powers. That is true with the national government and that is true with the state governments. The state is the organism, the government is the organ. The state is the principal, the government is the agent. Therefore, the Supreme Court was confusing the powers that belong to a government with sovereignty.

One of our great contributions internationally is that we made the thing work in this country, that is, we developed a government deriving its power from the people, and we have made it work to such an extent that the people have, under that government, secured their individual rights, their liberty. It is spreading to all parts of the world.

The old notion of what a law is must be restated to be in harmony with this conception of sovereignty. Many years ago the Court of Appeals of New York said that a law is a rule of conduct prescribed by a superior which the inferior must obey. That definition was borrowed from England. All the lawyers in the United States have used that definition for generations. It is taught in our law schools. It is the answer expected in Bar examinations to the question, "What is a law?" It contemplates a superior and an inferior. It confuses government with sovereignty. It is not essential to law that inferiority should be implied in the obligation to obey. Laws must fulfill a need that is felt by the people. There are volumes of so-called blue laws, which are long since forgotten, and to which no attention is ever paid. We may observe a statute for years and until it has been declared unconstitutional by the Supreme Court, which means that it never was a law. A Governor may approve a law against the tipping of waiters and proceed immediately to give the waiter a tip for courteous service. We know that as a matter of fact and experience a law is a rule of conduct which is obeyed. A criticism has been made that we are a country of lawbreakers and have no respect for the law. Perhaps in some instances that criticism may be merited, but we know also that many laws will be ignored because they do not appeal to the best thought of a majority of the people at a given time. Public opinion, when well matured, should be the guide to the legislator, and the legislator must rise to the dignity and intelligence of those for whom he acts.

"In England government was based on sovereignty; here it is derived from citizenship. There obedience depended upon subjection; here it depends upon consent. Submission and allegiance was a badge of inferiority; citizenship is the charter of

equality." In the United States there are citizens, but no subjects. There is no oath of allegiance other than to support the Constitution and laws. By destroying inequality and applying the doctrine of delegated power we destroyed the old English idea of a sovereign so far as government is concerned and established a government republican in form.

We should now consider the term "Nation," which has been so loosely used during the past few years. It is important to remember in this connection that sovereignty is not an attribute of a nation.

The word "Nation" has been confused with the term "sovereignty" and "state" and "government" and "society." A nation is a concept that has changed in its content in different stages of development. The word is derived from the Latin word "Nascor," meaning to be born. Therefore, the original idea of the nation was blood relationship; that is, the nation consists of a people bound together by something in common. The thing in common was blood originally, and that is true of all primitive societies so far as we know. But when a society becomes complex and developed, it is not possible to trace relationship or blood, and the group becomes too large to define in that way. Therefore, something else is substituted for blood or is added to blood. Land became a common tie in early society, and we find men bound to the soil. That was true of all Western Europe and in Russia, China and elsewhere in different stages of development. Language is a tie—common language. Religion is a tie. Law becomes a tie; custom, tradition, all of these, so that as society moves on this thing that binds becomes more and more complex.

There is a tendency on the part of some to hold that "Nation" and "State" are interchangeable terms, but such cannot be the case. If it were true, then a nation would have sovereignty. A nation is not a state at all. A nation consists of a people that possess certain things in common. Formerly it was blood relationship, formerly it was language, formerly it was religion, formerly it was common law. Today, perhaps the most accurate statement that can be made is that a nation consists in a group of people who possess a common culture. The word culture includes literature, includes law, includes language, but not necessarily the same language; includes religion, but not necessarily the same religion. This thing we call culture is the thing that binds in what we call a nation. A nation is a broader term than the term state. The United States is a state. It is composed of people that occupy the territory belonging to the United States. Canada is not a state. It is a territory with actual boundaries. There are people occupying that territory, but those people do not possess sovereignty, which is the earmark of a state. Therefore, Canada is not a state, but the British Empire is a state. The people occupying the territory of the British Empire constitute the people of that state. The people of that territory possess sovereignty. Therefore it is a state. Yet we belong to the same nation as Great Britain. Therefore, the word nation is a much broader term than the word state. We belong to the same nation as the people of Australia. The American soldier in France found many things in common with the soldier from Australia, with the soldier from Canada, more so, perhaps, than they found in the soldier from England. There was that common reaction, that unconscious spiritual feeling that is hard to define, which we call culture. That is a nation. The importance of it in this discussion is that sovereignty does not reside in a nation. Sovereignty resides in a state. Therefore, the word nation must be kept distinct from the word state. Any other view leads to grave difficulties.

The individual citizen, for his own highest development and for the highest welfare of society, should act freely within the sphere of freedom; the impulse to such action is a universal quality of human nature, but sovereignty (the state) is

alone able to define the elements of individual liberty, limit its scope and protect its enjoyment. The individual is thus defended *against* the government by the power that makes, maintains and can destroy the government; and by the same power, *through* the government, is defended against encroachments from every other quarter.

This is the only view that can reconcile liberty with law. This presumes liberty and law in proper balance.

Individual liberty consists generally in freedom of the person, equality before the courts, security of private property, freedom of opinion and its expression, and freedom of conscience.

It is the sovereignty back of the government which defines and defends individual liberty, not only against all forces extra-governmental, but against the arbitrary encroachments of government itself. This is where *our* constitutional law is so far in advance of that of any other country.

It is sovereignty that vests our courts with powers to interpret the Constitution in behalf of our rights and immunities and defend them against the arbitrary acts of legislatures and executives; that creates the duty of the executive to obey final decisions of the courts and execute the laws; that provides for impeachment on failure of the executive to do so; that gives us the right to amend the Constitution and thus prevent nullification by governmental servants. What better guaranty of individual liberty against government could be devised?

In the great body of the people sovereignty resides. From it flows all the blessings of life, liberty and happiness. Out of it government is projected in all its forms—local, state and federal. In it are reconciled government and freedom—law and liberty. From a study of it we learn anew the meaning of the words: "We, the people of the United States."

## GIFTS—CONSTRUCTIVE DELIVERY

### HUNT v. GARRETT

### 275 S. W. 96

(Court of Civil Appeals of Texas, April 4, 1925)

**Delivery of key to tin box containing choses in action, and constructed for the purpose of excluding from its contents all persons save the one in possession of the key, constitutes sufficient delivery of box and its contents, where made with intent to give donee absolute ownership and right of possession.**

CONNER, C. J. Rufus S. Garrett, administrator of the estate of G. W. Hunt, deceased, instituted this suit against W. W. Hunt in the district court of Tarrant county to recover the possession of certain securities and written evidences of debt, specified in his petition, of the alleged value of $30,000.

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The vital issue in this case was whether it was true, as defendant in substance claimed, that the deceased, G. W. Hunt, before his death, delivered to his brother the key to the tin box described in the evidence, with the intent of thereby conferring upon his brother, as a gift, the absolute right of possession and of property in the contents of the box. If so, it can scarcely be denied that, under the circumstances, the delivery of the key would constitute a sufficient delivery of the box, which was constructed for the purpose of excluding its contents from all persons save the one in possession of the key. While a gift of choses in action or personal property as claimed in this case must be accompanied by delivery of the property made the subject of the gift, what amounts to a delivery must be determined from all of the circumstances. It may be constructive, as illustrated in the case of Weems v. First National Bank, (Tex. Civ. App.) 234 S. W. 931. In that case the donor, before going on military service, removed to his sister's home a dresser, one of the drawers of which was locked. Upon delivery of the dresser he gave his sister a key. Upon opening the drawer, the sister found a package of papers, including a deposit slip for $300 in figures, and a note saying: "This is all yours, I will never call for it." In discussing the law applicable, the court said:

"It is true, as contended by plaintiff in error, that in order to constitute a valid parol gift causa mortis, there must be a delivery by the donor of the thing given and an actual acceptance of it by the donee; the transaction being such as to divest possession and control of the

property out of the donor and to place it absolutely under the dominion of the donee. But actual, physical delivery of a chose in action or of an incorporeal right cannot be required. In such cases what amounts to delivery must be determined from all the facts and circumstances of the case, and constructive delivery is held to satisfy the requirements of the law."

See, also, Miller v. Williams, 195 Iowa, 1305, 192 N. W. 798; Osgood v. Carter, 110 Me. 550, 87 A. 477.

But we think we need not dwell upon this feature of the case, for it does not seem to be seriously contested. We think it must be further held that the evidence in the case sufficiently established that up to the time when G. W. Hunt visited the Braswell Sanitarium upon the 11th day of April, 1923, for the purpose of having an operation performed, the property in controversy found in the tin box was the property of G. W. Hunt, and that the plaintiff administrator was entitled to recover the same, unless the defendant, by a preponderance of the evidence, established the gift of said property, as claimed by him in his pleadings and upon the trial. To do this the burden of proof was on him, and in such cases it is held established, as said in 20 Cyc. p. 1223, that—

"As a general rule, to establish a gift inter vivos there must be a preponderance of clear, explicit, and convincing evidence in support of every element needed to constitute a valid gift. It is necessary to establish by this kind of evidence, competency of donor, delivery, acceptance, and the parting of the owner with his control, or right of dominion over the subject of the gift. This rule is especially applicable where the gift is not asserted until after the donor's death, and where a confidential relation existed between the parties, some decisions holding that in such cases the evidence must be as clear as that required to sustain a gift, causa mortis, and must be so cogent as to leave no reasonable doubt in the mind of an unbiased person that the demand is a proper one."

It is further said in R. C. L., vol. 12, p. 973:

"The evidence of the circumstances of a gift of an unindorsed chose in action should be full, clear, and convincing. When the claim of a gift is not asserted until after the death of the alleged donor it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift."

Many authorities of like tenor and effect might be cited, but the propositions so asserted will scarcely be denied.

But the material question for our determination is not whether the evidence is sufficient to support a finding in favor of the administrator on the vital issue in this case, but the question is whether the evidence as a whole, viewed in the most favorable light to him, is such as to entitle W. W. Hunt to have the issue of his right to the property as claimed by him submitted to and determined by the jury which was impaneled in the case. If so, the court was in error in giving the peremptory instruction to which appellant has assigned error.

One of the constitutional and legislative guaranties of right in a citizen of this country is the right of a trial by jury. We need not trace the history of the constitutional and legislative provisions relating to this subject, for it will not be denied that with the English speaking people the right of a trial by a jury of one's peers has long been vigorously asserted and jealously guarded and maintained by our courts. And, while it is undoubtedly within the power of courts to take a case away from a jury and require a finding in favor of one or the other of contesting litigants, the rule to be applied by the court in determining whether or not this may be correctly done was thus stated by our Supreme Court in the case of Lee v. International & G. N. Ry. Co., 89 Tex. 588, 36 S. W. 63, 65:

"To authorize the court to take the question from the jury, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it."

In Mynning v. Detroit, L. & N. R. Co., 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804, the rule is stated thus:

"If the circumstances are such that reasonable minds might draw different conclusions respecting the fault of the injured party, he is entitled to go to the jury upon the facts, the judge directing a verdict only when the case is susceptible of but one just opinion."

It was said in the case of Joske v. Irvine, 91 Tex., 574, 44 S. W. 1059, after a review of the authorities by Mr. Justice Denman of our Supreme Court, that—

"From a careful examination of the cases it appears, (1) that it is the duty of the court to instruct a verdict, though there be slight testimony, if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established—such testimony in legal contemplation falling short of being 'any evidence,' and (2) that it is the duty of the court to determine whether the testimony has more than that degree of probative force."

After as careful a consideration of the evidence as we have been able to give we have concluded that it cannot be said that there is not "any evidence" in support of appellant's claim of gift,

and that the circumstances offered in his behalf, when construed favorably to him, only raise a mere suspicion or surmise which it is the duty of the courts to disregard. No witness testifies that the key to the tin box was not given to the defendant, W. W. Hunt, as he claims in his petition. The testimony before the jury undoubtedly tended to show that appellant was in the actual possession of the box and the key under a claim of right. It is true that his mere claim would not establish the fact, but the fact of possession and the claim explanatory thereof was relevant. The court admitted proof that the appellant received the key about 9 or 10 a. m. on the 11th day of April, 1923, during the lifetime of his brother, G. W. Hunt. If this be true, he did not surreptitiously and with fraudulent purpose obtain possession of the key of the box after the death of G. W. Hunt. It is true that the mere possession of the key prior to the death of G. W. Hunt, even if it be admitted that G. W. Hunt delivered the key to the appellant, does not necessarily prove that it was so done with the intent and purpose of conferring upon appellant the title and right of possession of the property in the tin box. The key might have been so delivered in trust that his brother might care for the property until the contemplated operation had been completed, or for delivery to others in event G. W. Hunt did not recover. But these are only inferences. Whether so or not, we think it was the right of the jury to determine. The evidence was conflicting as to whether G. W. Hunt was upon affectionate terms with his relatives in Tennessee. At least two of the witnesses testified to the effect that he said he could not live with them, and in the same connection expressed gratitude and affection for appellant. It was for the jury to determine the conflict. It was undoubtedly shown that appellant and his wife had for several years been very kind in caring for G. W. Hunt. He made his home with them, and many times expressed his gratitude for their care. There was evidence that the deceased expressed the purpose of going back to Tennessee to change some of his papers. Just what paper or papers he desired to change was not shown, but the only paper presented upon the trial of a character which would require alteration in event his purpose was to change his benefactions was his will.

There was evidence tending to show that appellant, during the time he was caring for his brother, G. W. Hunt, was in some financial difficulty or desirous of financial assistance, and that G. W. Hunt manifested his love for and confidence in appellant by coming to appellant's relief. It may be said also that the evidence tends to show that the deceased did not deposit the key to the tin box in the office at the sanitarium when about to be operated upon. At least it was shown that he deposited his watch and presumably other valuables in the office, and no one from that office testified that the key was among the articles so deposited. It could not have been so deposited, if true, as the court permitted both Mr. and Mrs. Hunt to testify, that appellant received the key at about 9 or 10 o'clock on the 11th day of April, 1923, and that he had retained it in his possession ever since. It was argued on the submission that it was unbelievable that G. W. Hunt would deliver the key to the tin box and make a gift of its contents to his brother, and thus deprive himself of all means of support when he presumably had a hope of recovery. This is a very reasonable inference, but must it be accepted as undisputed? G. W. Hunt was a very old man, of an age when schemes of future investments and the lure of additional accumulations do not ordinarily exist, and can it be said that a jury might not reasonably conclude from the evidence of his affection for his brother and Mrs. Hunt and from their kind care and treatment of him and other circumstances, that in gratitude, and with the confidence that should he recover, he could rely upon his brother to care for the gift of his property and care for him personally. One further fact, not heretofore referred to, is the unquestioned proof of the good character of appellant for honesty and fair dealing. This evidence was undoubtedly relevant. It came from the mouth of many witnesses, those who professed to know him well, and who, from their business positions and otherwise, seem to be persons of credibility and more or less probably known to the jury. Such testimony was not objected to on the part of appellant, nor, indeed, could it have been, for in all cases where the charge against a party amounts to fraud or a crime evidence of his good character is competent. Under our statutes, the jury is made the exclusive judges of the credibility of the witness and the weight to be given to the testimony, and we think it was for the jury, in this case, to determine that weight should be given to the fact of appellant's good character, as well as to all other facts in the case. It was written by one of the sages of old that "a good name is rather to be chosen than great riches, and loving favor rather than silver or gold." And we venture the assertion that there are very few men of mature age who have not known others, living and dead, whose character for honesty and integrity was such that strong evidence would be required to establish a charge that they had been guilty of violating the trust and confidence of a deceased

brother and of embezzling and robbing minors and other kindred to whom both alike were related, such as in effect constitutes the charge against appellant in this case, and thus destroy the priceless heritage of a good name. On the whole, therefore, we conclude that the court erred in taking the case away from the jury and giving the peremptory instruction complained of, for which error the judgment should be reversed upon the issue, determined adversely to appellant and the cause remanded.

In view of the reversal and new trial, we think we should briefly notice several assignments of error complaining of the court's action in his rulings. Complaint of the court's action in rejecting the evidence referred to in appellant's first and second propositions, we think, is sufficiently answered by the showing in the appellee's brief to the effect that the rejected evidence was in substance otherwise admitted and before the jury. The proffered testimony of appellant himself to the effect that on the morning of April 11, 1923, while in the room at the sanitarium, and before going to the operating room, that his brother, G. W. Hunt, while undressing for the operation, took from his pocket the key to the tin box which contained the securities and property in controversy and handed the key to him and said, "I want you to have everything that is in that box, it is yours," and that witness accepted it, etc., we think was forbidden by article 3690 of our Statutes, which provides that—

"In actions by or against executors, * * * in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party," etc.

This statute, in substance and effect, is to be found in our federal enactments and in many of the states of the Union, and a very full discussion of the subject of the competency of witnesses as to transactions with deceased persons in view of such statutes may be found in Jones' Blue Book on Evidence, vol. 4, beginning on page 621 with section 772. In that article (section 780) it is said that the statute may be waived, as indeed is indicated by our own statute, if the representative of the deceased calls upon the adverse party to testify. In this case, however, appellant was not called on to testify by the plaintiff, and we recall no testimony drawn out in behalf of appellee on the cross-examination of appellant that would amount to a waiver. Further treating the subject of waiver, the author on evidence referred to, in section 783, declares that the statute may also be waived if the representative testifies, or causes other witnesses interested in the estate to testify, as to transactions or communications of the deceased. But as to other witnesses not interested in the estate, the author thus states the general rule—

"that, if the representative calls witnesses who are not interested in the estate to testify as to transactions or communications of the deceased, or incompetent with the adverse party, the testimony so given does not constitute a waiver of the right to objection to the testimony of the adverse party."

The rule as so stated is well supported by the authorities. Hence we think that the fact that the plaintiff in this case called on Drs. Braswell and Roberts to testify as to what occurred in the office of the sanitarium did not operate as a waiver of the plaintiff's right to object to the testimony of appellant W. W. Hunt, last above referred to.

Appellee has also presented several cross-assignments of error, complaining of the court's peremptory instruction to find a verdict against the appellee on the notes executed by defendant as alleged in his petition, etc., but we think we cannot consider these cross-assignments. The appellee at the time did not except to the charge so given, nor did he file a motion for new trial complaining of such action, nor did he give notice of appeal from the judgment against him that was rendered in accordance with the peremptory instruction. It is true rule 101, promulgated for the government of district and county courts, provides that an appellee may file cross-assignments of error, but the application of this rule, we think, is confined to the subject-matter and relevant to the questions involved in the appeal actually prosecuted. In the case before us the causes of action as presented in appellee's petition were distinctly severable. One was a suit for the recovery of the choses in action and property described in appellee's petition—an action in the nature of the common-law action of detinue and trover. As to this feature of the plaintiff's claim, no money recovery in the way of damages for a conversion of the choses in action, etc., was sought. The other action was purely one ex contractu. Appellee alleged and sought to recover from appellant a money judgment upon promissory notes charged to have been executed by appellant, and suit on this cause of action might have been separately instituted and prosecuted. Under such circumstances we do not think the rule permitting cross-assignments of error sustain those presented by appellee in this case.

In Woeltz v. Woeltz, 106 Ky. 207, 57 S. W. 35, Judge Williams discusses the rule giving an appellee the right to file and have considered cross-assignments of error, but concludes his discussion by the statement that—

"This rule does not permit assignments of errors as between co-appellees. Anderson v. Silliman, 92 Tex. 560, 50 S. W. 576. Nor does our decision apply to a case where the appellate proceeding does not embrace a distinct part of a severable judgment of which the appellee or defendant in error seeks to complain. The question which would arise in such a case is not before us."

In Wright v. Giles, 60 Tex. Civ. App. 550, 129 S. W. 1163, it was held (quoting from the headnote) that "parties who did not give notice of appeal in the trial court cannot have judgment for costs against them reviewed," evidently for the reason that the judgment for costs was separable from and independent of the subject-matter of the litigation.

In the case of Gilmer v. Veatch, 102 Tex. 384, 117 S. W. 430, in an opinion by Chief Justice Gaines, it was held (quoting from the headnote) that—

"Cross-assignments by an appellee who had not himself taken an appeal and which do not affect the interest of the appellants in the judgment will not be considered."

Texas & N. O. Ry. Co. v. Skinner, reported in 4 Tex. Civ. App. 661, 23 S. W. 1001, was a case in which a mother sued the railway company for damages in her own right and as next friend of a minor child, and there was a verdict and judgment against her as next friend, but in her favor as an individual. On appeal by the railway company from the judgment for the mother in her individual right, the mother filed cross-assignments of error, complaining of the judgment against her as next friend of the minor, and it was held that her cross-assignments of error would not be considered, inasmuch as she did except to the judgment, and gave no notice of appeal, and filed no appeal bond.

In support of appellee's right to have his cross-assignments of error considered, he urges a written agreement signed by counsel for both plaintiff and defendant to the effect that plaintiff's cross-assignments of error might be incorporated in the transcript on appeal, and that, as so presented, they might be considered by the appellate court. But we are of opinion that counsel cannot give this court jurisdiction by mere agreements. Our jurisdiction is defined by the written law, and cases not brought within our power of revision by notice of appeal and other requirements cannot be considered.

We accordingly finally conclude, for the reasons stated, that the judgment below, in so far as the issue between the parties relating to the choses in action and other property alleged by plaintiffs to be unlawfully detained by defendant, be reversed, and the cause remanded for another trial, but that plaintiff's cross-assignments of error be not considered, and that the judgment below in appellant's favor on the issue of his liability upon the promissory notes alleged to have been executed by him be left undisturbed in accordance with rule 62-A for the courts of Civil Appeals, which reads in part as follows:

"If it appears to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error."

NOTE—*Delivery of Key to Receptacle as Sufficient Gift Causa Mortis.*—In the case of Apache State Bank v. Daniels, Oklahoma, 121 Pac. 237, it appeared that James Daniels, on his death bed, said to his wife: "Florence, I give you all of my bank stock, and all of my property, and my diamonds. Take my key to our box and keep it, and allow no one to have it." The bank stock was in a small tin box in a vault in an adjoining room, to which both the deceased and his wife had access. There were two keys to this tin box, one of which was usually carried by the deceased and one key by his wife. At the time these words were spoken, the wife had both keys on her belt, and transferred his key from his key-ring to hers. Nothing else was done prior to his death. It was held that this was not a sufficient delivery to constitute a valid gift *causa mortis*.

It seems that in addition to the foregoing case, like holdings in the cases of Hatch v. Adkinson, 56 Maine 324, Dunn v. Houghton, New Jersey Equity, 51 Atlantic 71, and Knight v. Tripp, 121 Calif. 674, 54 Pac. 267, proceed upon the theory "that a delivery of a key to a receptacle which is itself present will not of itself constitute a delivery of the contents of the receptacle."

However, in Debinson v. Emmons, 158 Mass. 592, 33 N. E. 706, it was held that there was a good gift *causa mortis* of a trunk and its contents, including a bank book, where the donor and donee were joint occupants of a room, and the donor almost *in extremis*, handed the donee the keys of two trunks at the foot of her bed, declaring to the donee that the trunks and all in them were hers.

In the cases of Thomas v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, Foley v. Harrison, 233 Mo. 460, 136 S. W. 354, and Herrick v. Dennett, 203 Mass. 17, 89 N. E. 141, it is held that delivery of the key to a safe deposit box is sufficient delivery of its contents to complete a valid gift *causa mortis*.

Other cases will be found in a note on this subject in 40 L. R. A. (n. s.) 901.

# DIGEST

**Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.**

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1. **Assignments** — Undue Influence. — That deceased was suffering from senile dementia for some months prior to his death and during a period when the assignments were executed did not render him incapable of making such assignments.—Rollins v. Smith, Cal., 238 Pac. 171.

2. **Associations** — Use of Emblems. — Fraternal order, though not incorporated or engaged in business for profit, may enjoin continued use of its constitution, laws, nomenclature, and emblems by another order, and such right is not dependent on showing of specified injury, nor misleading of any particular person; it being sufficient if there was a natural and probable tendency to mislead and confuse the public to the hurt and injury of plaintiff orders.—Burrell v. Michauk, Tex., 273 S. W. 874.

3. **Automobiles**—Driver's Negligence.—Defendant, when he allowed another party to drive his automobile, and sitting at the driver's side cautioned him relative to his driving, made the driver his servant or agent, and, where driver did not exercise due care, his negligence was the negligence of defendant.—Day v. Isaacson, Me., 130 Atl. 212.

4.——"Due Care."—Where defendant's car, equipped with a crane as wrecker, was towing an uncontrolled truck with defective steering gear, and the fastenings between the crane and the truck were so made that the two cars were not continuously rigid, held that such a combination moving at night developed a unique situation, demanding a high degree of diligence on the part of its operator to constitute due care.—Tower v. Camp, Conn., 130 Atl. 86.

5.——Insurable Interest.—In view of Complete Texas Statutes 1920, Penal Code, arts. 1358e, 1358f, 1358g (Vernon's Ann. Pen. Code Supp. 1922, arts. 1617¾d-1617¾f), sale of secondhand automobile, made without giving and filling bill of sale and transferring license fee receipt, is void, and, where purchaser of secondhand automobile who resold it and reserved mortgage did not comply with statute, neither he nor his vendee had an insurable interest in car, though bill of sale was executed and recorded after fire occurred.—Hennessy v. Automobile Owners' Ins. Ass'n, Tex., 273 S. W. 1024.

6. **Bankruptcy**—Lien.—Where creditor of partnership, with knowledge that it was insolvent, acquiesced in dissolution agreement whereby one partner withdrew and then loaned money to remaining partner for use in continuing business, it was not entitled, when such partner subsequently sold business and went into voluntary bankruptcy, to equitable lien on property which had belonged to old partnership.—Dakota Trust & Savings Bank v. Hanson, U. S. C. C. A., 5 Fed. (2d) 915.

7. **Banks and Banking**—Deposit of Deceased Person.—Deposit of deceased person may not be applied to note not maturing before his death.—Horigan Realty Co. v. First Nat. Bank, Mo., 273 S. W. 772.

8.——Good-faith Depositor.—Holder of certificate of deposit drawing greater interest rate than allowed by Rev. Code 1919, § 9014, as amended by Laws Sp. Sess. 1920, c. 32, is party to illegal transaction, and hence not a good-faith depositor, within section 9020, as amended by Laws 1921, c. 134, requiring superintendent of banks to certify to depositors' guaranty fund commission amount necessary to pay good-faith depositors in insolvent bank.—First Nat. Bank v. Hirning, S. D., 204 N. W. 901.

9.——Set-Off.—At and prior to the failure of a state bank the plaintiff owed it a promissory note of $200, and at the same time the bank owed the plaintiff $725.27. In a suit by the plaintiff against a bank which had purchased the assets of the insolvent bank the plaintiff was entitled to set off what the insolvent bank owed him against his note; said sums being mutual debts existing at the time the state bank commissioner took over the insolvent institution.—Bank of Woodward v. Robertson, Okla., 238 Pac. 844.

10.——Subscription to Stock.—Alleged misrepresentations by official inducing subscription to capital stock of trust company did not make stock void, but gave stockholder right only to rescind subscription before liquidation of company began.—Bittenbender v. Cosmopolitan Trust Co., Mass., 148 N. E. 619.

11.——Worthless Check.—A belated payment of $15 on a worthless check for $200 does not render the offender immune to criminal prosecution under R. S. 21—556.—Ex Parte Myers, Kan., 237 Pac. 1026.

12. **Bills and Notes**—Fraudulent Sale of Note.—Where three of five directors, acting without authority, executed note, and two of them, falsely representing that corporation owed one of such directors a large sum, negotiated it, permitting part of proceeds to be retained by purchaser in satisfaction of claims against such director individually, and depositing mortgage bonds as security, held that such purchasers were not innocent purchasers, and corporation was not liable on note, and indorser paying it could not enforce the security.—In re Paoli Lithia Springs Hotel Co., U. S. C. C. A., 5 Fed. (2d) 902.

13. **Bridges**—Liability for Collapse.—Clear intent of Highway Law, § 331, is to preclude recovery if bridge collapses as result of being subjected to higher strain than that prescribed therein.—Smith v. Town of Troupsburg, N. Y., 211 N. Y. S. 1.

14. **Brokers**—Commission.—A writing in the following words: "The undersigned agrees to pay a commission of three and one-half per cent for his services of sale of my property located at No. 65 Shepard avenue, Newark, N. J., to T. Grunt, which sale already has been made," signed by the owner, but addressed to nobody and mentioning no broker, is not sufficient to satisfy section 10 of the Statute of Frauds (2 C. S. p. 2617) as amended by P. L. 1918, p. 1020, requiring that the authority for selling real estate be in writing, or the authority recognized in writing, whether or not such writing is signed by the owner before or after such sale has been effected.—Shapiro v. Canada, N. J., 129 Atl. 870.

15. **Building and Loan Associations**—Interest.—Interest on building and Loan association bond and mortgage at 8 per cent held not usurious because payable monthly.—Yorkville Building & Loan Ass'n v. Foster, S. C., 129 S. E. 44.

16. **Carriers of Passengers**—Baggage.—In controversies between passengers and common carriers over the loss of interstate baggage, state courts are bound by the acts of Congress, the terms of transportation fixed by the published tariffs on file with the Interstate Commerce Commission, the regulations of that body, and the rules and decisions applied in federal tribunals.—Robidoux v. Chicago & N. W. R. Co., Neb., 204 N. W. 870.

17.——Designated Speed.—Act No. 120 of 1921, § 11, making it a misdemeanor to drive passenger motor transfer of more than seven passenger carrying capacity at a speed in excess of 25 miles an hour, without special permit from Louisiana highway commission, held violative of equal protection clause of Const. U. S. Amend. 14.—State v. Carter, La., 105 So. 247.

18.——Duty of Taxicab Driver.—Driver of taxicab has primary duty to care for safety of vehicle and of passenger, and passenger is under no duty save in exceptional cases to look out for dangers that may be encountered, at risk of being charged with contributory negligence.—Garrow v. Seattle Taxicab Co., Wash., 238 Pac. 623.

19.——Negligence.—Carrier held not liable for injury to passenger, caused by violent closing of toilet door of coach due to lurch of train, on theory that to allow door to remain open constitutes negligence. —Crabtree v. St. Louis & S. F. R. Co., Mo., 273 S. W. 1104.

20. **Cemeteries**—Burial Right.—Under an agreement entitling persons who die within communion of Roman Catholic faith to be buried in a cemetery owned by a bishop, the question whether a party was of such faith, so as to be entitled to burial there was solely for ecclesiastical determination.—Roman Catholic Bishop of Portland v. Yencho, Me., 130 Atl. 177.

21. **Constitutional Law**—Attorney's Fees. — Act No. 225 of 1918, providing for recovery of 10 per cent of attorney's fees in actions on bonds, held not unreasonable and arbitrary in discriminating between primary and secondary obligors, and between successful plaintiff and successful defendant, nor violative of federal and state Constitutions in denying equal protection of law or taking property without due process.—Carruth v. Port Hudson Oil Developing Co., La., 105 So. 302.

22.——Cotton Standards.—Acts 1920, p. 140, which fixes cotton standards for grading purposes, held not void as violative of freedom of contract.—M. Hohenberg & Co. v. Hendrix, Ala., 105 So. 195.

23. **Contracts**—Breach.—A court of equity will not decree performance of a continuing contract which one of the parties can terminate at will, but will leave the parties to their remedy at law.—Reichert v. Pure Oil Co., Minn., 204 N. W. 882.

24. **Corporations**—Doing Business Within State. —A foreign corporation, which in developing real estate for marketing purposes did practically everything, assumedly in a manner not ultra vires, which any company engaged in development of land would do under like circumstances, such as the giving and recording in this state of mortgage on such land, and the mapping, plotting, advertising for sale, appointment of agents to sell the various lots, and the taking of steps to improve and develop the property to sell it in lots, held to be doing business within the state, within statute.—Brown v. John P. Smythe & Co., N. J., 129 Atl. 871.

25.——Good Will.—Defendant could not challenge validity of contract not to engage in optical business within the state, or proper organization of corporation to which his optical business was sold, where he was the first organizer of corporation, gave it his name, subscribed for all but three shares of its capital stock, and then sold and transferred his stock to president of corporation, and corporation had carried on its business under contract for more than 5 years, and defendant had not refunded money received on sale of stock.—Thompson Optical Institute v. Thompson, Ore., 237 Pac. 965.

26.——Proxies. — That United States revenue stamps on proxies were not canceled did not invalidate proxies, nor justify election judges in refusing to receive and count them, if they were offered while polls were open.—Young v. Jebbett, N. Y., 211 N. Y. S. 61.

27. **Druggists** — Misbranded Drugs. — Seizure of drugs misbranded in violation of Act June 30, 1906, § 8, par. 2 (Comp. St. § 8724), is jurisdictional, and must precede filing of libel for forfeiture under section 10 (Comp. St. § 8726), and be alleged in libel, in view of sections 3-5 (Comp. St. §§ 8719-8721), and Judiciary Act (Comp. St. 1901, § 563), and notwithstanding punctuation of section 10.—United States v. Eight Packages and Casks of Drugs, U. S. D. C., 5 Fed. (2d) 971.

28. **Electricity**—Degree of Care.—Allegations that the defendant electric railway company did carelessly and negligently place electric wires of high and dangerous voltage and defective and worn insulation, between the limbs and through the branches and foliage of a magnolia tree, of great height and numerous limbs and low hanging branches, on defendant's right of way directly across the track from defendant's depot or station and unfenced; that at the time and for many years there had been and was located a public primary school adjacent to said depot or station house and abutting the right of way boundary of defendant's electric railway, which schoolhouse was in close proximity to said tree on the defendant's right of way and in plain view of the children in attendance at said school; that the school was in daily session attended by children of immature age and discretion; that the magnolia tree bore flowers in the spring of the year that would be attractive to children of immature age, all of which should have been known to the defendant; that plaintiff, a boy eight years of age, a pupil attending said school, being attracted and allured thereto, climbed the tree to gather the flowers therein, and in doing so came in contact with and was injured by defendant's electric wires carrying high and dangerous current of electricity and passing through and among the branches and foliage of the tree—taken with other appropriate allegations, state a cause of action for compensatory damages for injuries sustained as a proximate result of the negligence alleged.—Stark v. Holtzclaw, Fla., 105 So. 330.

29.——Negligence.—The construction and maintenance, by a canal company and a company generating electricity, of an electric transmission wire carrying 44 000 volts, sagging at places, within reach of a child nine years of age standing on the ground, without warnings, barriers, fences, or other obstructions protecting or guarding the line where trespassers may reasonably be expected, though the ground immediately beneath the wires was difficult of access, being a steep spoil bank made by the excavation of dirt deposited by drag-line buckets, is wanton negligence.—Ellis v. Ashton & St. Anthony Power Co., Idaho, 238, Pac. 517.

30.——Negligence.—Neglect of third party to take measures to protect deceased lineman from result of defendant telephone company's fault did not excuse defendant from consequences of its negligence.—Derosier v. New England Telephone & Telegraph Co., N. H., 130 Atl. 145.

31. **Employers' Liability Act**—Unloading Mail.—Action for injuries to employee while unloading mail from interstate car at distributing point was properly brought under federal Employers' Liability Act.—Missouri Pac. Ry. v. Baldwin, Tex., 273 S. W. 834.

32. **Extradition** — Hypothecation of Customers' Securities.—In extradition proceedings under Ashburton Treaty of 1842, as supplemented in 1889, where charges against accused and evidence in support of them were sent to English authorities, English magistrate, in determining that offenses charged, including violation of Penal Law, § 956, for hypothecation of customers' securities, were offenses requiring extradition under the treaty, will be presumed to have done his duty, and his determination is conclusive upon courts in this country that offenses alleged constitute an extraditable offense.—People v. Hanley, N. Y., 148 N. E. 634.

33. **Fire**—Bean Stalks Not "Hay."—The stalks, stems, and other residue, left after bean plants have been threshed and the bean kernel or seeds removed, is not "hay," within the meaning of section 8556, C. S.—State v. Choate, Idaho, 238, Pac. 538.

34. **Fixtures**—Oil Machinery.—Where a well is a producer and thereafter becomes a non-producer, lessee, who owns casing and fixtures, may within a reasonable time remove them.—Orfic Gasoline Production Co. v. Herring, Texas, 273, S. W. 944.

35.——Ginning Machinery. — Ginning machinery, installed on premises after execution of real estate mortgage thereon, becomes fixtures and subject to mortgage lien, notwithstanding chattel mortgage on machinery, where contract under which such machinery was purchased, providing that it should not become a fixture to any realty, had been discharged by payment of the purchase price; such provision being for benefit of seller rather than third party mortgagee.—Planters' Bank v. Lummus Cotton Gin Co., S. C., 128 S. E. 876.

36. **Frauds, Statute of**—Evidence of Contract.—Complaint for specific performance of contracts to buy lots was barred by statute of frauds, where signature to some of contracts unmistakably showed some person other than defendant had signed them, and there was no evidence as to written authority given by defendant to sign same.—Sussex Inv. Co. v. Clendaniel, Del., 129 Atl. 919.

37. **Fraudulent Conveyances**—Notice of Intent.—A conveyance of property, made with the intention of hindering, delaying, or defrauding creditors, is void as against creditors. If the transaction is bona fide and on a valuable consideration, and the party taking has no notice or ground for reasonable suspicion of the intention to hinder, delay, or defraud creditors, the conveyance is valid. But if the party taking has notice of the intention of the maker to hinder, delay, or defraud his creditors, or has ground for reasonable suspicion of such intention, the conveyance is void as against the creditors of the maker.—McLendon v. Reynolds Grocery Co., Ga., 129 S. E. 65.

38. **Infants**—Mothers' Pension. — Allowance for support of fatherless minor children in charge of widowed grandmother is not authorized under Mothers' Pension Law (Rev. Code 1919, §§ 10023-10030); grandmother not being a "mother" within section 10024, providing that the child or children for whose benefit the allowance is to be made must be living with the mother.—In re Stone, S. D. 204 N. W. 946.

39. **Insurance** — "Disposal or Concealment.'"—Policy insuring seller of an automobile against loss or damage sustained by disposal or concealment of such automobile by vendee, with intent to defraud seller, does not entitle seller to recover a loss sustained by vendee's removal of car without the state, where there was no idea of "disposal or concealment."—Seattle Dodge Service Co. v. Royal Ins. Co., Wash., 238, Pac. 568.

40.——Identity of Insured.—Where partnership was doing business under name of individual, and both partners were present when fire policy on partnership property was applied for, and informed agent that they were partners, and were advised by agent to take out policy in firm name, policy provisions requiring policy to truly state insured's interest and that insured be sole owner were not violated by taking out policy in firm name, notwithstanding partnership was not registered.—Calhoun v. Star Ins. Co., La., 105 So. 231.

41.——Mortgage.—Under New York standard mortgage clause, where insurer denied liability to others than holder of security deed solely because mortgagor's transferee burned the property, stipulation that property was sold by assured subject to security deed, and statement of notification to insurer that it had been so sold, showed that he, as original owner, would suffer loss by its destruction, and therefore had insurable interest in it, and payment by insurer to mortgagee extinguished debt, and was payment on policy as to assured, which latter could assert as payment and discharge of notes when sued thereon by insurer as assignee of mortgagee.—Pike v. American Alliance Ins. Co., Ga., 129 S. E. 53.

42.——Suicide.—Comp. Laws 1917, § 1171, eliminating suicide of policy holder of any "life insurance company" after first policy year, as defense against payment of "life insurance policy," applies to accident insurance companies insuring lives; Acts 1921, c. 29, differentiating between life and accident insurance companies for other purposes.—Carter v. Standard Acc. Ins. Co., Utah, 238 Pac. 259.

43.——Total Incapacity.—In action for indemnity under policy requiring that injury incapacitate insured from date of accident from performing any and every kind of duty of his occupation, right hemiplegia, accompanied by aphasia, caused by a lesion of the brain due to concussion as result of a fall, held to warrant total recovery, notwithstanding insured returned to work after accident, but complained of headaches and inability to see, and condition resulting in entire inability to work developed gradually.—Booth v. United States Fidelity & Guaranty Co., N. J., 130 Atl. 131.

44.——War Risk Policy.—Under a regulation made by virtue of authority given by War Risk Insurance Act, § 13 (Comp. St. 1918, Comp. St. Ann. Supp. 1919 § 514kk), providing that a change of beneficiary may be effected by "notice in writing to the Bureau of War Risk Insurance, signed by the insured or by his duly authorized agent," such a notice, to which, as shown by the evidence, the name of insured was signed by his wife, at his request and in his presence, held sufficient.—Le Blanc v. Curtis, U. S. C. C. A., 6 Fed. (2d) 4.

45. **Interstate Commerce**—Sale of Bookkeeping System.—Sale by local agents of foreign corporation of McCaskey register system for bookkeeping held interstate commerce, not requiring filing of articles of incorporation in office of secretary of state to procure permit as prerequisite for bringing action within state, under Rev. St. arts. 1314-1321, notwithstanding transaction involved installation, which was mere incidental agreement.—McCaskey Register Co. v. Mann, Tex., 273 S. W. 1113.

46. **Juries**—Ku Klux Klan.—On voir d're examination of jurors in criminal case, refusal to allow defendant's counsel to examine some of them as to their membership in and affiliation with the Ku Klux Klan, and to compel answers to such questions, held error.—State v. Hoelscher, Mo., 273 S. W. 1098.

47. **Landlord and Tenant** — Knowledge of Defect.—Landlord was liable for damages sustained by tenants when wall of building collapsed from defect not disclosed to tenants, if, when lease was made he suspected that premises contained a defect, dangerous to tenants' occupancy, since such a suspicion was legal equivalent of knowledge of the defect.—Charlton v. Brunelle, N. H., 130 Atl. 216.

48. **Licenses**—Auto Taxis.—City ordinance, exacting same license fee from all operators of auto taxis and busses for hire, is not void for discrimination.—City of Bozeman v. Nelson, Mont., 237 Pac. 528.

49.——Motor Fuel.—Ordinance imposing a license tax on those engaged in selling motor fuels and other oils held invalid, where tax imposed in its operation affected manner of conduct of purchaser's business, as touching wholesaler from whom plaintiff purchased its oils for resale.—Woco Pep Co. of Montgomery v. City of Montgomery, Ala., 105 So. 214.

50. **Master and Servant**—Inexperienced Servant.—Inexperienced servant, placed in position toward which experienced superior servant had to tilt heavy wheel, so as to catch flange under that of wheel held by inferior servant in making wheel lock, held not chargeable with knowledge that miscalculation of distance or time would cause wheel to fall on him.—Evans v. Southern Wheel Co., Mo., 273 S. W. 749.

51.——Scope of Employment.—In action for injuries to pedestrian when struck by truck delivering packages to express office, evidence that driver of truck deviated from usual route to express office to drive fellow employees home to lunch, for their convenience, held to make question for jury whether he was acting in course of employment and to sustain verdict for plaintiff.—Dennis v. Miller Automobile Co., Cal., 238 Pac. 739.

52.——Slander by Servant.—Insurance company held liable to former agent for slanderous remark made by its superintendent of agents at meeting of agents, while discussing collection by agents of payments due on industrial insurance, regardless of whether it had ratified the slander; the remark having been made while superintendent was engaged in employer's business.—Mann v. Life & Casualty Ins. Co. of Tennessee, S. C., 129 S. E. 79.

53. **Municipal Corporation** — Claim for Personal Injury.—Claim for personal injuries presented to municipality held sufficient under Charter of City of Tacoma, § 257, though notary before whom claim was sworn to did not attach his seal, where it was proven that the claim was actually sworn to before the notary who signed the jurat.—Melovitch v. City of Tacoma, Wash., 238 Pac. 563.

54.——Discretion in Public Officer.—Ordinance No. 210 of 1923 of city of Shreveport, acting under commission form of government, provided by Act No. 302 of 1910, giving commissioner of public safety power to adopt and enforce rules prohibiting parking of vehicles, etc., within areas, and for time limited, to be designated by him within his discretion, held unconstitutional, as vesting arbitrary discretion in him, relating to legislative duty of enacting traffic ordinances, a duty which commission council itself should perform.—City of Shreveport v. Herndon, La., 105 So. 244.

55.——Interstate Ferry.—A town cannot grant an exclusive franchise to operate a ferry from such town to point in other state, in view of effect on interstate commerce.—McNeely v. Mayor and Board of Aldermen, Town of Vidalia, U. S. D. C., 6 Fed. (2d) 21.

56.——Special Assessment.—The owner of an equitable mortgage and other lienholders, or persons simply having such interest in property that they may be affected by the enforcement of a special assessment against it by a municipality for paving purposes, are not entitled to notice and an opportunity to be heard in assessment proceedings, where the real owner has been served with notice and has consented to the assessment.—Leitch v. City of Dublin, Ga., 128 S. E. 889.

57. **Nuisance** — Filling Station. — That gasoline filling station, not nuisance per se, might become so under certain conditions and with certain accessories, held not to justify restraining order in anticipation.—Smith v. Standard Oil Co., Md., 130 Atl. 181.

58. **Sales**—Breach of Contract.—Buyer of potatoes, who breached contract, held not entitled to have advance payment, made and forfeited, by subsequent purchaser of potatoes from seller, offset against damages due seller for breach of first contract, in absence of any showing that potatoes involved in second contract were same as those originally sold.—Metzler v. Balcom, Wash., 237 Pac. 716.

59. **Statutes**—Public Safety.—General right to engage in a trade, profession, or business is subject to the power inherent in the state to make necessary rules and purporting to operate uniformly on all persons who manufacture, sell, or use economic poisons, held to be based on a natural and valid classification, and not to be unconstitutional as special legislation.—Gregory v. Hecke, Cal., 238 Pac. 787.

60. **Taxation**—Installment Paper.—Company purchasing from dealers conditional sale contracts, leases, chattel mortgages, and notes on pianos and piano players, calling for installment payments having average maturity of about thirty months, payments being collected by dealer and remitted to company under contracts between company and manufacturers, held not subject to Laws 1923, c. 897, taxing money competing with national banks.—People v. Goldfogle et al., Commissioners of Taxes and Assessments, N. Y. 211 N. Y. S. 120.

61.——Investment Company. — Investment company, buying and selling complete issues of corporate bonds secured by realty mortgages, having powers defined in General Corporation Law, Stock Corporation Law, and Banking Law, except those stated in section 293, subds. 4, 5, and not having power to receive deposits or to issue its own debenture bonds or notes secured by deeds or deeds of trust, held not in competition with national banks, and not subject to taxation under Laws 1923, c. 897.—People v. Goldfogle, N. Y., 211 N. Y. S. 114.

62.——National Bank Shares.—Large amounts of such moneyed capital so employed are held by individuals and are taxed under the money and credits act at the rate of 3 mills on the dollar, while the shares of defendant are taxed at several times that rate. This is a discrimination forbidden by the statute, although the purpose in taxing such capital at such a low rate was to increase the revenue therefrom.—State v. First Nat. Bank, Minn., 204 N. W. 874.

63.——National Bank Shares.—Taxing the shares of national banks against the holders, and the moneyed capital of state banks against the banks, thus allowing state banks to deduct their tax-exempt securities in fixing the taxable value of such moneyed capital, is permissible under the federal statute.—State v. First Nat. Bank, Minn., 204 N. W. 874.

64.——"Odd Lot" Brokers.—Money invested in stock brokerage firm doing "odd lot" and "specialist" business, buying and selling stocks on its own account, and carrying only a few accounts for personal accommodation of firm members and their relatives, held not in competition with national banks and not taxable under Laws 1923, c. 897; "odd lot" business consisting in buying or selling any amount of stock from one share to 99, and equalizing broker's position by purchasing or selling in 100-share lots, and "specialist" being floor broker, specializing in limited group of stocks.—People v. Goldfogle, N. Y., 211 N. Y. S. 107.

65.——Private Bank.—Money invested in firm doing private banking, commission, and investment business, including receiving deposits subject to check and bills of exchange, discounting of commercial paper, loans on personal security with deposit of collateral security, and dealing in foreign exchange, was competing with national banks and was subject to taxation under Laws 1923, c. 897.—People v. Goldfogle, N. Y., 211 N. Y. S. 110.

66.——Shares in Trust.—Shares in a voluntary unincorporated association, created under laws of commonwealth and established by deed of trust conveying real estate within commonwealth and creating a pure trust, held to constitute "property within the commonwealth," within G. L. c. 65, § 1, as amended by St. 1922, c. 403, § 1, and subject to excise tax thereunder.—Baker v. Commissioner of Corporations and Taxation, Mass., 148 N. E. 593.

67.——Stock Brokerage Firm.—Money invested in stock brokerage firm engaged in buying and selling stocks, bonds, and foreign exchange on commission basis solely for customers, and which, in case of marginal accounts, pledged stocks, bonds, and foreign exchange to banks and trust companies as collateral for loans thereon, held not in competition with national banks and not taxable under Laws 1923, c. 897.—People v. Goldfogle, N. Y., 211 N. Y. S. 119.

68.——Stock Brokerage Firm.—Money invested in seat in stock exchange and in stock brokerage firm engaged in buying and selling stock, bonds, and commodities solely for customers, principally on margin and remainder for cash, its profits being from commissions, and which financed customers' purchases with its own funds and with additional money borrowed from banks, trust companies, and other brokers, held not in competition with national banks, and was not subject to taxation under Laws 1923, c. 897, notwithstanding it charged interest on customers' debit balances as incident to buying and selling securities.—People v. Goldfogle, N. Y., 211 N. Y. S. 117.

69. **Trusts**—Conveyance to Wife.—When a husband conveys land to his wife, with whom he is living, at the time of the conveyance, the presumption arises from the relation of the parties that no trust was intended to be created upon the land in favor of the grantor.—Semple v. Semple, Fla., 105 So. 134.

70. **Weapons** — "Concealment." — Where officer, making arrest, by feeling with his hand, found a loaded revolver on floor of automobile at defendant's feet, the night being so dark that the revolver could not be seen, it was "concealment," within Rev. St. 1919, § 3275.—State v. Renard, Mo., 273 S. W. 1058.

71.——Concealment.—In prosecution for carrying concealed weapon, whether revolvers on seat of automobile, between accused and another, and hidden from view, constituted carrying deadly weapons concealed weapon, whether revolver on seat of tion.—State v. Scanlan, Mo., 273 S. W. 1062.

72. **Wills**—Designation of Legatees.—Will drawn by surrogate having several years' experience, for testatrix, devoted to scholarly pursuits and particularly to genealogy, giving residue to surviving "nephews and nieces," held not intended to include a grandniece, because of use of plural form, and because otherwise there would be only one niece to whom term was applicable.—In re Andrews' Will, N. Y., 210 N. Y. S. 763.

73.——Scrivener's Mistake.—That scrivener of will mistakenly used name "Bessie" for "Lessie" and "Lessie" for "Bessie" held not to so invalidate will as to warrant denial of probate, where descriptive language clearly indicated persons intended by decedent, and where there remained other provisions of will not affected by such mistake.—In re King's Will, S. C., 128 S. E. 850.

74. **Workmen's Compensation**—Injury to Fellow Employee.—Where an employee is on duty, engaged in rendering service to his employer, and some other employee, in a spirit of fun, throws a rock at such employee on duty, and he strikes it with a stick and the rock glances and strikes the employee on duty and injures him, the facts will support a finding by the State Industrial Commission of accidental injury occurring in the course of and growing out of the employment.—Marland Refining Co. v. Colbaugh, Okla., 238 Pac. 831.

75.——Street Sweeper.—Street sweeper, engaged in his duties, and struck without having heard any warning of approach of automobile, held not contributorily negligent as matter of law in failing to keep constant lookout for approaching cars.—State Compensation Ins. Fund v. Scamell, Cal., 238 Pac. 780.